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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

AT&T Corporation and  
MediaOne Group, Inc.

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CS Docket No. 99-251

COMMENTS AND REQUEST FOR IMPOSITION OF CONDITIONS

THE WIRELESS COMMUNICATIONS  
ASSOCIATION INTERNATIONAL, INC.

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August 23, 1999

No. of Copies rec'd 044  
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## EXECUTIVE SUMMARY

The Wireless Communications Association International, Inc. ("WCA") has an immediate and substantial interest in the Commission's disposition of the various license transfer applications filed to effectuate AT&T's proposed acquisition of MediaOne Group, Inc. ("MediaOne"). If the transaction is given unconditional approval by the Commission, AT&T will hold total or partial ownership interests in cable systems serving approximately 60% of all cable subscribers in the United States, and thus will have an unprecedented ability to force programmers (whether or not they are vertically integrated with a cable operator) into exclusive contracts or contracts that otherwise discriminate against alternative multichannel video programming distributors ("MVPDs"). Indeed, filings made with the Commission not long ago by programming networks owned by MediaOne provide ample evidence of the market power that the combined companies will have over the programming community.

Moreover, the Commission has already recognized that AT&T's strategy of linking its nationwide fiber network to TCI's regional cable system "clusters" heightens the risk that programming that is today subject to the program access rules will be migrated from satellite to terrestrial delivery and denied to competitors on that basis. Once MediaOne is added to AT&T's portfolio, consolidation and the associated risk of terrestrial migration will increase even further. Particularly in light of the recent unwillingness of the Cable Services Bureau to address the very real problem of programming being migrated to terrestrial distribution (and out of the reach of the program access rules), it is imperative that the Commission adopt prophylactic conditions now to avoid having to address a substantial problem later after the damage has been done.

For these reasons, WCA submits that the Commission can and should condition any approval of the transaction on the receipt of an explicit, enforceable commitment from both entities that AT&T will not enter into any programming contracts that are exclusive or that otherwise include terms and conditions that discriminate against alternative MVPDs, regardless of how the underlying programming is owned or how it is delivered to subscribers. Should, however, the Commission have any doubts as to whether AT&T's market power will enable it to extract exclusivity or other discriminatory terms and conditions from programmers, WCA recommends that the Commission, as it did during the course of its review of the Fox/Primestar transaction in 1998, conduct a further inquiry into the contractual arrangements AT&T and MediaOne already have with program suppliers. WCA suspects that the results of that inquiry will eliminate any doubts that the combined AT&T/MediaOne will have the ability and the incentive to extract discriminatory terms and conditions from programmers, to the substantial detriment of alternative MVPDs and their customers.

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**COMMENTS AND REQUEST FOR IMPOSITION OF CONDITIONS**

The Wireless Communications Association International, Inc. ("WCA"),<sup>1/</sup> by its attorneys and pursuant to the Commission's July 23, 1999 *Public Notice* in the above-captioned proceeding,<sup>2/</sup> hereby submits its comments with respect to the various license transfer applications filed in connection with the proposed merger between AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne"), and requests that the Commission impose program access conditions on any Commission authorization permitting the merger to be consummated.

**I. INTRODUCTION**

Insofar as program access is concerned, the AT&T/MediaOne transaction embodies every multichannel video competitor's worst nightmare. The Commission has repeatedly recognized that

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<sup>1/</sup> WCA is the principal trade association of the fixed wireless broadband industry. Its membership includes virtually every terrestrial wireless video provider in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; Local Multipoint Distribution Service ("LMDS") licensees; producers of video programming; and manufacturers of wireless broadband transmission and reception equipment. WCA therefore has a direct and substantial interest in the Commission's review of the AT&T/MediaOne transaction and the agency's resolution of the public interest issues raised therein.

<sup>2/</sup> See "Cable Services Action: AT&T and MediaOne Group, Inc. Seek FCC Consent For a Proposed Transfer of Control," *Public Notice*, CS Docket No. 99-251 (rel. July 23, 1999).

concentration of ownership among the cable MSOs is the true source of the program access problem, since (1) it only further empowers the cable MSOs to force programmers into discriminating against competing multichannel video programming distributors ("MVPDs"), and (2) it heightens the risk that vertically-integrated programmers will attempt to evade their program access obligations by migrating programming from satellite to fiber delivery. If AT&T's acquisition of MediaOne receives unconditional approval, AT&T will hold total or partial ownership interests in cable systems serving approximately 60% of all cable subscribers in the United States, giving it unprecedented leverage over the programming community.<sup>3/</sup> Moreover, AT&T has previously refused to give the Commission any assurances that programming will not be migrated to AT&T's fiber network, and, not coincidentally, AT&T makes no bones about the fact that it will continue to create regional system clusters that the Commission has already acknowledged are prime candidates for terrestrial migration. In other words, if there were ever a transaction that demanded the imposition of prophylactic program access conditions to protect cable's competitors and their customers, this is it.

Virtually every argument AT&T offers in opposition has either been debunked in public filings by MediaOne's own affiliates or rejected by the Commission in other proceedings. Moreover, the imposition of program access conditions on the merger would in no respect

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<sup>3/</sup> According to the ownership statistics submitted with the AT&T/MediaOne transfer applications, AT&T's ownership of MediaOne would give AT&T ownership interests in cable systems serving nearly 40 million of the estimated 65.4 million cable subscribers in the United States. See Applications and Public Interest Statement re: Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, and AT&T Corp., Transferee, CS Docket No. 99-251, Appendix A (filed July 7, 1999) (the "AT&T Public Interest Statement"). See also *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24288 (1998) (estimating cable subscribership to be approximately 65.4 million) (the "Fifth Annual Report").

undermine AT&T's ability to enter the local exchange market via cable television infrastructure, which AT&T admits is the primary rationale for its acquisition of MediaOne. At bottom, AT&T's arguments are merely a disingenuous attempt to capitalize on the Cable Services Bureau's "hands off" approach to program access, under which it appears that virtually any sort of anticompetitive market condition or behavior will be allowed to persist so long as it is not prohibited by the letter of Section 628 of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Given the unprecedented market power AT&T would enjoy upon its ownership of both TCI and MediaOne, there is no legitimate public interest justification for the Commission to continue down that path.

Accordingly, for the reasons set forth below, WCA requests that the Commission condition any approval of the AT&T/MediaOne transaction on an explicit, enforceable commitment that AT&T will not enter into any programming contracts that are exclusive or that otherwise include terms and conditions that discriminate against alternative MVPDs, regardless of how the underlying programming is owned or how it is delivered to subscribers. Further, should the Commission have any doubts as to whether AT&T's market power will enable it to extract discriminatory terms and conditions from programmers, WCA recommends that the Commission, as it did during the course of its review of the Fox/Primestar transaction in 1998, conduct an inquiry into the contractual arrangements AT&T and MediaOne already have with program suppliers, and require both entities to provide the Commission (subject to an appropriate protective order) with full details as to the nature, terms and conditions of any volume discounts or other preferential terms and conditions they have received from program suppliers (including any written or oral agreements, side letters or

understandings related thereto), and to provide all relevant documentation of such arrangements for Commission review and comment by interested parties.

## II. DISCUSSION

### A. *The Fatal Flaws In AT&T's Arguments Have Already Been Exposed in Public Filings by MediaOne Affiliates.*

Whatever the putative benefits of AT&T's local telephony strategy may be, the fact remains that cable's control over local distribution of multichannel video programming has had a substantial chilling effect on the willingness of programmers to sell their product to cable's competitors. Indeed, the Commission has long recognized that concentration of ownership among cable operators is significant in the program access context because it increases the buying power of the major cable MSOs and facilitates their ability to act in concert against programmers and competing MVPDs.<sup>4/</sup> The Commission thus has stated to Congress that "[the program access] analysis should focus on the source of any market power involved (*the absence of competition at the local distribution level*) rather than on vertical integration itself."<sup>5/</sup>

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<sup>4/</sup> *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996). See also *Fifth Annual Report*, 13 FCC Rcd at 24362 (1998) ("Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful."); Comments of DirecTV, Inc., CS Docket No. 98-82, at 9-10 (filed Aug. 14, 1998) ("Concentration of ownership and consolidation of cable systems into regional clusters only strengthen the cable industry's influence over program suppliers. In the perceptions of program suppliers, no alternative MVPD has yet achieved a distribution level that promises a substitute distribution channel for cable. For these reasons, programmers remain principally dependent on cable MSOs and may be easily influenced to restrict the supply of programming to non-cable MVPDs.").

<sup>5/</sup> Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions (continued...)

Accordingly, it is beyond argument that programmers will be even more beholden to AT&T if AT&T is permitted to own TCI and MediaOne. As noted with respect to Time Warner's acquisition of Turner Broadcasting, "[b]ecause of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40%-60% of subscribers."<sup>5/</sup> Obviously, if AT&T alone holds ownership interests in cable systems serving 60% of the nation's subscribers, programmers will have no choice but to accede to AT&T's wishes.

Furthermore, it is well known that the large MSOs will not hesitate to use their control over distribution as a means of forcing independent programmers into exclusive contracts:

Operators warn that if existing programmers don't play ball on exclusivity, a new and similar network probably will. "There's more than one news service and more than one sports service now and more competition is inevitable," says an executive at one of the U.S.'s five largest MSOs. "We have choices and if one service doesn't want to work with us, we have other places we can go."<sup>7/</sup>

Notwithstanding the above, however, AT&T argues that its acquisition of MediaOne

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<sup>5/</sup> (...continued)

at 3 (Jan. 23, 1998) (emphasis added). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Fourth Annual Report)*, 13 FCC Rcd 1034, 1109 (1998) ("In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators.").

<sup>6/</sup> Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, *In the Matter of Time Warner Inc.*, FTC File No. 961-0004, at 7-8 (Sept. 12, 1996).

<sup>7/</sup> "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996).



“will have no anticompetitive effects in the thriving video marketplace.”<sup>8/</sup> AT&T contends that programmers will not be forced to kowtow to AT&T’s demands for exclusivity or other discriminatory terms and conditions, since they can always sell their product to alternative MVPDs.<sup>9/</sup> Indeed, AT&T goes so far as to contend that a combined TCI/MediaOne MSO will be a “relatively small video programming player.”<sup>10/</sup> Fortunately, the Commission need not devote much effort to rejecting these arguments — *public filings by affiliates of MediaOne* have already done the job.

On July 15, 1997, the Outdoor Life and Speedvision cable networks (the “Networks”), both partially owned by MediaOne, filed a Petition for Exclusivity with the Commission (the “Petition”), asking that they be allowed to enter into exclusive contracts with incumbent cable operators that would have been effective against all alternative MVPDs except DBS.<sup>11/</sup> MediaOne’s participation in and support of the Petition are not in question; indeed, the document includes a supporting declaration from MediaOne’s Senior Vice President of Programming at that time, Robert Stengel, who also served as MediaOne’s representative on the Networks’ Management Committee.<sup>12/</sup> The Petition was also supported by statements from the Networks’ own expert consultant, Robert W. Crandall,<sup>13/</sup> and their Executive Vice President and Chief Operating Officer, Roger Williams.<sup>14/</sup>

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<sup>8/</sup> AT&T Public Interest Statement at 43.

<sup>9/</sup> *Id.* at 45-46.

<sup>10/</sup> *Id.* at 43.

<sup>11/</sup> Petition of Outdoor Life Network and Speedvision Network, CSR-5044-P (filed July 15, 1997).

<sup>12/</sup> Petition, Exhibit 6.

<sup>13/</sup> *Id.*, Exhibit 2 (the “Crandall Statement”).

<sup>14/</sup> *Id.*, Exhibit 1 (the “Williams Statement”).

As demonstrated below, the Networks' arguments as to the cable MSOs' market power and influence over programmers are exactly the opposite of what AT&T is arguing here. A side-by-side comparison of AT&T's Public Interest Statement and the Networks' Petition brings the contradictions into sharper focus:

AT&T: "The emergence and development of DBS and other significant competitors to cable means that programmers now have meaningful alternative outlets for their programs."<sup>15/</sup>

***MediaOne: "Cable systems are still the primary distributor of multichannel video programming and, thus, carriage by the nation's cable systems is central to the Networks' ability to increase subscriber penetration to adequate levels. Not even carriage by all of the non-cable MVPDs in the United States would be sufficient to make networks like Outdoor Life and Speedvision commercially viable."***<sup>16/</sup>

\* \* \*

AT&T: "[T]he approximately 25 percent share of current MVPD subscribers [that AT&T would hold after its acquisition of MediaOne] vastly overstates AT&T's post-Merger position with respect to video programmers. . . The very existence of MSOs and other MVPDs depends on obtaining programming that subscribers are willing to pay to receive. . . [C]able systems must acquire the programming that their customers demand or they will lose subscribership to DBS and other competing MVPDs."<sup>17/</sup>

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<sup>15/</sup> AT&T Public Interest Statement at 54.

<sup>16/</sup> Petition at 14. *See also* Crandall Statement at ¶ 15 ("The success of new specialized, niche cable programming networks turns critically on their ability to obtain carriage on cable systems that reach a substantial share of television households. Even though the new non-cable multichannel distribution media are growing rapidly, these distributors do not reach sufficient households to allow new niche networks to attain financial viability. These new networks must, therefore, obtain carriage on a large number of traditional cable systems.").

<sup>17/</sup> AT&T Public Interest Statement at 58-59.

**MediaOne:** *"[E]xclusivity protection is often the deciding factor in the difference between success and failure in achieving the ultimate break-even subscriber levels of at least 20 to 25 million subscribers. Indeed, a cable system will often choose a lower-quality network with exclusivity protection over a high-quality program service that cannot offer such protection . . . ."*<sup>18/</sup>

\* \* \*

**AT&T:** "The entities that provide the overwhelming amount of video programming are large, sophisticated corporations that exercise substantial selling power through their control of unique, highly differentiated products."<sup>19/</sup>

**MediaOne:** *"[S]ince the Networks' business plans were first formulated, the number of new programming networks has increased substantially while the amount of extant channel capacity on cable systems has decreased. Competition for valuable channel space and financial instability in the cable industry have completely altered the nature of programming negotiations, as evidenced by many cable operators' demands for high up-front payments and lower license fees in exchange for carriage."*<sup>20/</sup>

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<sup>18/</sup> Crandall Statement at ¶ 32.

<sup>19/</sup> AT&T Public Interest Statement at 58.

<sup>20/</sup> Petition at 38 (footnotes omitted). See also Crandall Statement at ¶ 20 ("The fact that a new program service may be owned in part by or affiliated with the system's parent MSO is less persuasive than other incentives, such as up-front payments, a period of free service or exclusivity protection, that affect the local system's bottom line."); Petition at 38 n.166, citing Higgins and Katz, "Swimming Upstream: Programmers Caught in TCI's Recovery Net; Tele-Communications Inc.'s Higher Launch Fees," *Multichannel News* at 1 (Nov. 18, 1996) (TCI seeking fat up-front launch fees and reduced licensing fees from new and established networks; Fox News and Animal Planet are paying \$14 and \$18 per sub to launch, respectively); Katz and Higgins, "Industry Abuzz over TCI Moves," *Multichannel News*, at 1 (Dec. 23, 1996) (TCI's actions to squeeze cash payments from programmers has industry talking); Hofmeister, "Cable Preparing for a Brighter '97," *Los Angeles Times* at D-1 (Dec. 27, 1996) ("TCI has threatened to knock off channels that charge fees in favor of new ones that are offering a bounty to be carried.").

The record speaks for itself. WCA requests that the credibility of AT&T's arguments on the program access question be viewed in light of the admissions that MediaOne's own affiliated programming networks have made to the Commission. The proof is undeniable -- if AT&T is permitted to acquire MediaOne, programmers will be at the combined company's mercy, and competitive MVPDs and consumers will pay the price.

***B. AT&T's Arguments Are Based On Facts That Are Not Germaine To The Program Access Analysis.***

AT&T contends that the impact of its common ownership of TCI and MediaOne on program access should be measured by the number of national, satellite-delivered programming services in the marketplace.<sup>24/</sup> This argument misses the point entirely - - as already recognized by the Commission and demonstrated rather clearly in the Outdoor Life case, it is cable's control over local distribution, not the number of programming services in the marketplace, that bears on whether alternative MVPDs will have nondiscriminatory access to programming. And, as demonstrated below, there is substantial marketplace evidence that proves the point.

The saga of Fox's attempt to invest in the cable-controlled Primestar DBS service is perhaps the most telling example of how heavily TCI (now AT&T), MediaOne, the large cable MSOs influence the behavior of supposedly independent programmers, to the decided disadvantage of cable's competitors. Initially, Fox attempted to enter the domestic DBS business by partnering with EchoStar, an entity that is completely independent of the cable industry and whose high-power DBS service competes directly both with cable and Primestar. In subsequent testimony before Congress, Fox chairman Rupert Murdoch touted the pro-consumer benefits of increased competition to cable

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<sup>24/</sup> AT&T Public Interest Statement at 45.

from the Fox/EchoStar joint venture and, in that same pro-competitive spirit, assured Congress that “we will sell our programming to any customers.”<sup>22/</sup>

Unfortunately, Mr. Murdoch lost his enthusiasm for his joint venture with EchoStar after cable operators responded by refusing to discuss carriage of Fox’s various cable networks:

Murdoch was initially enthusiastic about the News Corp./EchoStar merger, but his ardor cooled once cable operators began refusing to talk to Fox programming people.<sup>23/</sup>

Indeed, the cable industry’s position was put rather succinctly by Jeff Marcus, chairman of Marcus Cable (at that time the nation’s ninth-largest MSO):

If someone is threatening to burn your house down, you don’t invite them in for lunch first. We are not going to give them money so they can build a competing satellite business.<sup>24/</sup>

Unwilling to put the financial viability of Fox’s cable networks at risk, Mr. Murdoch ultimately took the path of least resistance, left EchoStar at the altar and switched his DBS affections to the cable-controlled Primestar:

Time Warner, Inc. and [Fox] appear to have entered a symbiotic truce following [Fox’s] new proposed affiliation with cable TV industry-owned Primestar Partners L.P. [Fox] originally proposed a merger with EchoStar Communications Corp. to compete with cable TV operators. But according to industry sources, [Fox] received not-so-subtle signals from cable TV operators that its cable TV

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<sup>22/</sup> Hearing of the Senate Commerce, Science and Transportation Committee (April 10, 1997) (testimony of Rupert Murdoch).

<sup>23/</sup> Colman, “Murdoch Goes From Big to Bit DBS Player,” *Broadcasting & Cable*, at 50 (June 16, 1997).

<sup>24/</sup> Hofmeister, “Murdoch Outfoxing Himself With New Satellite Venture?” *Los Angeles Times*, Part D at 1 (March 12, 1997) (reporting that after the announcement of the Fox/EchoStar transaction, Marcus Cable “slammed the door shut, refusing to meet with FX or News Corp.’s fledgling Fox News Channel.”).

programming would have trouble finding carriage on their systems if the EchoStar deal went through.<sup>25/</sup>

Leaving EchoStar at the altar was not the only instance in which Fox has capitulated to the cable MSOs in order to ensure carriage of its cable networks. It is well known that Fox News Channel ("FNC") owes its very existence to TCI, whose agreement to carry the channel on systems serving 90% of TCI's subscribers was critical to the successful launch of the network.<sup>26/</sup> Not coincidentally, Fox historically has refused to sell FNC to alternative multichannel video programming distributors ("MVPDs").<sup>27/</sup> The launch and subsequent cable-exclusive growth of FNC is yet another example of how the large MSOs control the destiny of "independent" programmers, and demonstrates why Fox (perhaps the most powerful programmer in the marketplace today) and others are unwilling to alienate the large MSOs by selling to cable's competitors.<sup>28/</sup> Contrary to what

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<sup>25/</sup> "Time Warner, News Corp. Enter Necessary Truce," *The Cable-Telco Report*, at 8 (Aug. 11, 1997). See also Colman, "Murdoch Goes From Big to Bit DBS Player," *Broadcasting & Cable*, at 50 (June 16, 1997) ("[A] deal with Primestar represents detente between Murdoch and cable operators - an essential outlet for [Fox] programming."); "News Corp. to Join Primestar; Time Warner With EchoStar?" *Media World* (May 27, 1997). It has also been reported that Mr. Murdoch's abandonment of the Fox/EchoStar joint venture was a prerequisite for TCI's blessing of Fox's \$2 billion acquisition of The Family Channel. Ross, "Murdoch, Malone Weigh \$1 Bil Deal: News Corp. Would Acquire Sports Assets From TCI's Liberty Media," *Advertising Age* (March 24, 1997) ("Initially, [TCI] was said to be so upset about the EchoStar deal that [it] wanted to kill a pact under discussion that would see [Fox] making a major investment in International Family Entertainment.").

<sup>26/</sup> "TCI Strikes Unique Deal With Fox News," *Media Daily* (June 24, 1996); see also *Communications Daily*, at 7 (June 25, 1996).

<sup>27/</sup> "ESPNEWS, Fox Sports Kicking Off Nov. 1," *Media Daily* (Oct. 28, 1996).

<sup>28/</sup> See also *Ameritech New Media, Inc. v. MediaOne Inc. and Time Warner Cable*, CSR-5273-P, at 5-7 (filed July 1, 1998).

AT&T is suggesting here, the actual number of programming services currently in operation has no bearing on that problem whatsoever.

Equally unpersuasive is AT&T's contention that the Commission's analysis of AT&T's potential influence over programmers should disregard any cable system in which AT&T holds a non-controlling equity interest if AT&T does not control programming choices or buy programming for that system.<sup>29/</sup> AT&T's argument is belied by the Commission's current position on ownership attribution where cable television is concerned. In its decision retaining the 5% voting benchmark for attribution under the cable/broadcast and cable/MDS cross-ownership rules, the Commission observed that

[I]n reviewing the evidence related to the issue of non-passive voting equity benchmarks, we remain convinced that shareholders with ownership interests of 5 percent or greater may well be able to exert significant influence on the management and operations of the firms in which they invest.<sup>30/</sup>

In fact, the Commission actually *tightened* its cable cross-ownership attribution benchmarks by adding a test based on *debt* as well as equity ownership. In so doing, the Commission stated that the potential exists

for certain substantial investors or creditors to have the ability to exert significant influence over key licensee decisions through their contract rights, even though they are not granted a direct voting interest or may only have a minority voting interest in a corporation with a single majority shareholder, which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much or

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<sup>29/</sup> AT&T Public Interest Statement at 54-55.

<sup>30/</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No 94-150 *et al.*, FCC 99-207, at ¶ 9 (rel. Aug. 6, 1999).

more influence or control over some corporate decisions as voting equity holders whose interests are attributable.<sup>31/</sup>

Finally, as WCA has previously argued before the Commission, the marketplace reflects that there are and will continue to be relationships within the cable industry that fall outside the letter of Commission's attribution rules but nonetheless have a prohibitive effect on an alternative MVPD's ability to acquire programming. Simply stated, the fact that AT&T may not have formal control over the programming decisions of certain cable systems does not eradicate the broad variety of other relationships and transactions between cable operators and between cable operators and programmers which have demonstrable anticompetitive effects on cable's competitors. Moreover, the Commission can expect that the cable MSOs will become even more closely interwoven with each other as they enter into joint telephony ventures with AT&T.<sup>32/</sup> Accordingly, WCA submits that the Commission should reject AT&T's self-servingly narrow concept of "influence" insofar as program access is concerned.

***C. AT&T's Proposed Acquisition of MediaOne Creates an Unprecedented Risk That Programming Will Be Migrated From Satellite To Terrestrial Delivery and Thereby Removed From the Scope of the Program Access Rules.***

AT&T is one of only a very few domestic long-distance carriers that currently possesses a coast-to-coast fiber optic network.<sup>33/</sup> As described in the various AT&T/TCI license transfer applications and now in AT&T's Public Interest Statement in support of its proposed acquisition of

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<sup>31/</sup> *Id.* at ¶ 154, quoting *Attribution Further Notice*, 11 FCC Rcd at 19904-05.

<sup>32/</sup> See, e.g., Kadlec, "AT&T Betting On Its Bundle," *Time*, at 44 (Feb. 15, 1999) (discussing Time Warner's agreement to give AT&T exclusive access to Time Warner's cable systems for purposes of providing local telephony).

<sup>33/</sup> *Teleport Communications Group, Inc.*, 13 FCC Rcd 15236, 15252 (1998).



Media One, AT&T's entry into the market for local residential telephone service will be achieved by integrating AT&T's network facilities with those of TCI's and MediaOne's cable systems, which themselves will be linked to form regional "clusters" to facilitate local loop service.<sup>34/</sup> Fortunately, the Commission sees what is coming, and thus made the following statement in approving AT&T's acquisition of TCI:

[T]he integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. . . [W]e remain aware of the potential for this type of migration and the possible need to address it in the future.<sup>35/</sup>

Recent developments reflect that the time for the Commission to address the problem is now. AT&T's acquisition of TCI and now MediaOne is part of a larger pattern of accelerated consolidation within the cable industry, and indeed the Commission has found that the top four

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<sup>34/</sup> See, e.g., AT&T Public Interest Statement at 25 ("[T]he merger will increase the strength of MediaOne's competitive telephony offerings because MediaOne will be able to access AT&T's existing network infrastructure. Through its acquisition of Teleport, AT&T has local facilities in a number of the same cities Media One's cable facilities serve. With those facilities, AT&T is able to connect some of its customers directly to its long distance network and thereby avoid ILECs' exchange access facilities and access charges."); *id.* at 30-31 (discussing clustering strategy that underlies AT&T's acquisition of MediaOne); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, AT&T/TCI Public Interest Statement at 21 ("AT&T and TCI anticipate combining their assets to invest in and develop advanced wireline facilities that will compete directly with ILECS to provide toll-quality voice and high-speed data communications to America's homes. TCI contributes its residential wireline network and architecture that currently serves approximately 12.7 million homes through cable systems controlled by TCI. AT&T contributes its experience in providing toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital to cover the significant costs of the upgrade of TCI's facilities to provide for two-way voice telephony.").

<sup>35/</sup> *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3180 (1999).

MSOs already control access to more than half of all cable subscribers in the United States.<sup>36/</sup> Moreover, the Commission's most recent statistics on clustering reflect that as of the end of 1997, a total of 34.4 million subscribers (*i.e.*, more than half of all cable subscribers in the United States) are already served by system clusters,<sup>37/</sup> and, as AT&T's proposed acquisition of MediaOne proves, this trend will continue apace as the MSOs combine their operations.<sup>38/</sup> Not coincidentally, the large cable MSOs have asked the Commission to liberalize both its cable ownership attribution rules and its horizontal ownership "cap," so that MSOs may continue to aggressively pursue their clustering strategies without running afoul of the Commission's horizontal ownership limitations for cable television system operators.<sup>39/</sup> In sum, the MSOs have developed, and are rapidly expanding, an

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<sup>36/</sup> *Fifth Annual Report*, 13 FCC Rcd at 24375.

<sup>37/</sup> *Id.*, 13 FCC Rcd at 24421 (Table C-2).

<sup>38/</sup> By way of example, Comcast has recently initiated or completed transactions that will give it control -- or the option to control -- all but one of the cable systems in the Washington, D.C. metropolitan area, plus the cable system serving nearby Baltimore, Maryland. Leibovich, "Comcast to Control Area Cable," *The Washington Post*, pp. E1, E10 (May 6, 1999) ("Cable firms have for many years moved to consolidate their holdings into regional pockets, or 'clusters' of systems. . . Unlike the highly balkanized cable industry of the past, operators in recent years have swapped or sold their holdings to assemble these large groups; the idea is to lower the overall cost of administration, marketing, billing and equipment purchases by placing them under one central office."). See also Comments of Ameritech New Media, Inc., CS Docket No. 99-230, at 9 (filed Aug. 6, 1999) ("As of July 1, 1999, Chicago, Illinois was served by seven cable incumbents . . . . However, after the completion of several system swaps and purchases, it is expected that AT&T/TCI will own virtually all of the cable fiber plant in the Chicago area.").

<sup>39/</sup> See, e.g., Comments of Cablevision Systems Corporation, CS Docket No. 98-82 and MM Docket No. 92-264, at 5-6 (filed Aug. 14, 1998); Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 19-24 (filed Aug. 14, 1998) (the "TCI Comments"); Comments of Adelphia Communications Corporation, *et al.*, CS Docket No. 98-82 and MM Docket No. 92-264, at 4-7 (filed Aug. 14, 1998); Comments of Time Warner Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 32-38 (filed August 14, 1998).

unprecedented capability to deliver programming via fiber, which necessarily heightens the risk that cable programming will be migrated from satellite to terrestrial delivery.<sup>40/</sup>

Moreover, there no longer is any question that the cable MSOs and their affiliated programmers, with the support of the Cable Services Bureau, can and will take advantage of the terrestrial migration loophole in Section 628(b) of the 1992 Cable Act. For example, New England Cable News, a regional news network partially owned by MediaOne, recently migrated from satellite to fiber delivery.<sup>41/</sup> Indeed fiber-based networks now deliver local cable programming to substantial numbers of subscribers in a number of markets, including New York City, Chicago, Philadelphia, Boston, Indianapolis, Minneapolis, Orlando, Columbus, Kansas City and southern New Jersey.<sup>42/</sup>

Most alarming, however, is the fact that these ostensibly "local" fiber networks are now being used by regional sports networks as a means of evading their program access obligations. Indeed, the Cable Services Bureau created a veritable blueprint for terrestrial migration in *DirecTV, Inc. v. Comcast Corporation et al.*,<sup>43/</sup> where the Bureau refused to take any action with respect to

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<sup>40/</sup> See Kennard Letter, Response to Questions at 6 ("Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . . [T]here . . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service.").

<sup>41/</sup> See Testimony of Decker Anstrom, President and CEO, National Cable Television Association, before the Senate Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997) ("Cable companies are deploying advanced network architectures to interconnect system headends using high capacity fiber optic rings. These architectures allow systems in the same geographical area to share the same headend and production facilities . . .").

<sup>42/</sup> *Id.* See also Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998).

<sup>43/</sup> 13 FCC Rcd 21822 (CSB, 1998).

Comcast's movement of certain Philadelphia sports programming from satellite to terrestrial delivery, notwithstanding Comcast's public admission that the migration was effected with the intent of avoiding the Commission's program access rules:

Comcast's purchase of the Philadelphia Flyers, 76ers and Phantoms inspired the company to start up a regional sports network, which debuts this month as a basic cable-service channel. The question now is whether Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act in order to lock up the Philly area's sports programming. "We don't like to use the words 'corner the market,' because the government watches our behavior," [Brian] Roberts says with a laugh. "Let's just say we've been able to do things before they're in vogue."<sup>44/</sup>

Not surprisingly, the Bureau's decision (which remains before the Commission on review) has been the centerpiece of the defense submitted by AT&T affiliate Cablevision System Corp. in response to the recent program access complaint filed by RCN Telecom Services of New York, Inc. with respect to the migration of satellite-delivered games from MSG Network and Fox Sport Net - New York to Cablevision's fiber-delivered MSG Metro suite of services.<sup>45/</sup> Similarly, the Tribune company recently migrated nearly 50 Chicago Cubs games from WGN to the fiber-delivered ChicagoLand Television Network.<sup>46/</sup> It has been reported that more of these allegedly "local" networks are on the drawing board for additional markets (including San Francisco and Columbus),

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<sup>44/</sup> "The New Establishment," *Vanity Fair*, at 166 (Oct. 1997).

<sup>45/</sup> See Program Access Complaint and Petition for Discovery, *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, CSR-5404-P (filed May 7, 1999).

<sup>46/</sup> "Ameritech Pressing FCC and Congress for Program Access Rule Changes," *Communications Daily* (Feb. 3, 1998).

and that these networks could carry regional sports network programming or perhaps even bid on that programming themselves.<sup>47/</sup>

Given the Bureau's apparent unwillingness to regulate terrestrial migration despite the Commission's recognition that cognizable program access claims may arise from "conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules,"<sup>48/</sup> there is virtually no possibility that an alternative MVPD will be able to obtain meaningful relief from terrestrial migration through the Commission's program access complaint process, particularly since the Commission has refused to give alternative MVPDs an automatic right to discovery in program access cases.<sup>49/</sup> As a result, AT&T's acquisition of MediaOne is precisely the type of situation where the Commission can and should impose program access conditions on any approval of the transaction, so as to minimize the possibility that alternative MVPDs and their customers will be victimized by migration of programming to AT&T's terrestrial network:

[E]ffective review at the initial stage of the transaction (*i.e.*, the license transfer) provides a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints. In addition, early identification of potential anticompetitive harm will also serve to mitigate the

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<sup>47/</sup> See Umstead, n. 42 *supra* ("[Time Warner/Columbus] hopes to turn the tables on the regional sports networks. [It] hopes that the success of [its] local sports network will allow [it] to actually compete with Fox Sports Ohio for the rights to such marquee programming as Cincinnati Reds Major League Baseball and Cleveland Cavaliers NBA games.").

<sup>48/</sup> *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18235 n.451 (1996).

<sup>49/</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, 15848-9 (1998).

proliferation of complaints under the Commission's rules. Finally, there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules.<sup>50/</sup>

***D. Any Doubts As To The Need for Program Access Conditions In This Case Should Be Resolved by an Inquiry Into AT&T's and MediaOne's Current Arrangements With Program Suppliers.***

AT&T is asking the Commission to approve the creation of a cable MSO that will hold ownership interests in cable systems serving the majority of all cable subscribers in the United States. That entity will have an unprecedented ability and incentive to harm competitors and their customers by migrating programming from satellite to terrestrial delivery, *and* by forcing programmers into contracts that discriminate against alternative MVPDs.

For instance, there should be little question that AT&T's proposed combined ownership of TCI and MediaOne will only further aggravate the already considerable competitive imbalance created by the steep volume discounts which cable programmers offer exclusively to the large MSOs. A recent study submitted to the Commission by Ameritech New Media, Inc. confirmed that cable incumbents are able to negotiate substantial discounts for popular programming - - discounts which bear no reasonable relationship to any actual cost savings realized by the program supplier. A small MVPD carrying the 19 basic cable networks included in the study would pay approximately \$27.13 more per subscriber annually than would an MVPD receiving the average industry discount - - and even more over and above the amount paid by large MSOs receiving the maximum off-rate card discounts.<sup>51/</sup> For a cable system operator with 100,000 subscribers, which would pay at or near

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<sup>50/</sup> *Tele-Communications, Inc. and Liberty Media Corporation*, 9 FCC Rcd 4783, 4786-7 (CSB, 1994) ("TCI-Liberty").

<sup>51/</sup> See Dertouzos and Wildman, "Programming Access and Effective Competition in Cable  
(continued...)

the top rate for most networks, this amounts to a more than \$2.7 million cost disadvantage.<sup>52/</sup> The study concluded as follows:

It is hard to rationalize price differences of this magnitude with the standard efficiency and incentive explanations for quantity discounts. Reduced delivery costs cannot explain such large price differences either, because a network's signal falls automatically on all cable headends within its satellite's footprint. Thus, the incremental cost of making a network available to an additional (wireline) MVPD should be close to zero, regardless of how many subscribers it has.<sup>53/</sup>

If, however, the Commission still harbors any doubts as to the market power a combined AT&T/MediaOne entity would hold over program suppliers, then the Commission should resolve the matter definitively by conducting a further inquiry into AT&T's and MediaOne's current arrangements with program suppliers. Specifically, the Commission should require AT&T and MediaOne to submit information (subject to appropriate confidentiality protection) as to volume discounts and other preferential terms and conditions that they receive from program suppliers, and allow all interested parties to inspect that material and comment thereon. There is precedent for such an inquiry in the Commission's merger approval process: during the course of its review of the Fox/Primestar merger, the International Bureau issued a letter inquiry asking the Primestar MSO partners to provide information as to their contractual arrangements with affiliated versus non-

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<sup>51/</sup> (...continued)

Television," at 5 (August 14, 1998) (submitted as Appendix A to Comments of Ameritech New Media, Inc., MM Docket No. 92-260 (filed Aug. 14, 1998)).

<sup>52/</sup> *Id.* The study further noted that if license fees paid by MVPDs are adjusted to reflect the importance of local advertising revenues to the largest MSOs, the disadvantage to a competing MVPD rises to as much as \$39 per subscriber annually, or \$3.9 million for a 100,000 subscriber system. *Id.*

<sup>53/</sup> *Id.*

affiliated programming services.<sup>24/</sup> A similar type of inquiry in this proceeding, focusing on the relationship between a programmer's actual costs of creating and delivering programming and the rates charged to any AT&T or MediaOne systems who purchase that programming, would give the Commission a badly needed foundation from which to begin evaluating the seriousness of the price discrimination problem, and would give the Commission a complete record from which it could confirm that the imposition of program access conditions on AT&T's acquisition of MediaOne is appropriate and necessary at this time.

### III. CONCLUSION

WCA recognizes that consumers benefit from vigorous competition in the marketplace, and thus WCA does not unconditionally oppose transactions that facilitate competitive entry by new providers of local telecommunications services. The fact remains, however, that the Commission cannot and should not sacrifice the interests of alternative MVPDs and their customers on the altar of promoting competition in the local loop. Given the high priority that both Congress and the Commission historically have accorded to program access, the Commission should not permit that agenda to be steamrolled by AT&T's desire for easier entry into the local telephone business. WCA thus submits that competition among MVPDs, and not just competition to the ILECs, must be a cornerstone of any public interest analysis of the AT&T/MediaOne transaction, and that the Commission's pro-competitive agenda will be best served by taking preemptive measures which ensure that consumers will not be harmed by abuses of the program access law. Accordingly, if the

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<sup>24/</sup> Letter from Regina M. Keeney, Chief, International Bureau, re: FCC File No. 91-SAT-TC-97 and 106-SAT-AL-97, at 3 (March 2, 1998). See also *Fifth Annual Report*, Appendix F (discussing results of Commission study as to relationship between cable rates and programming costs).



Commission elects not to deny the AT&T/MediaOne license transfer applications, WCA urges that any grant of those applications be subject to the safeguards recommended above.

Respectfully submitted,

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August 23, 1999

## **CERTIFICATE OF SERVICE**

I, Stephanie C. Sieber, hereby certify that a true copy of the foregoing Comments and Request for Imposition of Conditions was served this 23rd day of August, 1999, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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